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IN THE

Supreme Court Of The United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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The active litigation of a personal damages action against an incumbent President is unknown in our constitutional tradition. Such litigation would divert a President's energy and attention from his official duties, and would spawn a series of constitutional confrontations between the courts and the President. The litigation of such actions should therefore be deferred, in all but the most exceptional cases, until the President leaves office.

Respondent and her amici offer a number of unfounded arguments in opposition to deferral. They assert that litigation of this kind should not be viewed as an extraordinary event, even though history clearly shows that it is. They insist, in the face of overwhelming evidence to the contrary, that the burdens of the Presidency are not so great that such litigation would impede a President's ability to discharge his responsibilities. And they contend that deferral of such actions would

place a President "above the law" -- even though the President would remain amenable to liability when he leaves office.

Ultimately, however, respondent and her amici concede that such litigation would jeopardize a President's ability to discharge his constitutional responsibilities, and that some means must be found to protect the proper functioning of government. The question is how this is to be done. Respondent's proposed solution -- ad hoc "case management" by state and federal trial judges -- is no solution at all. It would multiply the litigation burdens on the Presidency and invite the use of civil litigation as a political weapon. Most troubling, it would require trial judges repeatedly to make complex, fiercely contested, discretionary rulings as to whether the President should attend to private litigation at the expense of his official duties -- rulings that inevitably would enmesh the trial court in Executive Branch management.

Deferral, by contrast, eliminates these problems. This limited form of protection accommodates both a plaintiff's right to seek legal redress, and the public interest in having a President available to perform the unique and demanding duties of his office. Deferral also preserves the separation of powers, and comports with the historic tradition that courts are to refrain from asserting jurisdiction over a President in all but the most compelling circumstances.

A. Respondent's "Scheme Of Deference" Does Not Adequately Safeguard The Presidency Or The Separation Of Powers.

Perhaps the most striking feature of the briefs of respondent and her amici is the contrast between their abstract complaint that deferral would place the President "above the law,"[1] and their energetic assertions that trial courts should

[1] Brief for Respondent ("Resp. Br.") 16. *See also* Brief of *Amicus Curiae* of Law Professors in Support of Respondent ("Resp. Prof. Br.") 3; Brief for *Amicus Curiae* Coalition of American Veterans ("CAV Br.") 10-11.

conduct litigation against the President in a fashion that is highly deferential to that office. Respondent, for example, states that trial courts "owe great deference to the presidency in overseeing litigation" (Resp. Br. 34) and that the President is owed "greater solicitude than . . . other defendants." *Id.* at 36. Respondent endorses what she calls "[t]he scheme of deference established by the court of appeals" (*id.* at 38), and confidently insists that this "scheme" should prevent "even the slightest impairment of presidential business." *Id.* at 39. She twice quotes, with emphasis, the concurring opinion below to the effect that the trial judge should " 'halt[] or delay[] or reschedul[e] *any* proposed action by *any* party at *any* time should she find that the duties of the presidency are even *slightly* imperiled.' " *Id.* at 35, 36 (quoting Pet. App. 25 (Beam, J., concurring)) (emphases added by respondent).

Respondent's amici further advocate special procedural rules in cases where the President is a defendant, such as holding the plaintiff to heightened pleading requirements; requiring the plaintiff to offer corroboration for her allegations before discovery can be obtained from the President; requiring the plaintiff to demonstrate that information she seeks by way of discovery is not available from any source other than the President; excusing the President from attending trial; and permitting him to testify on videotape instead of in person. Resp. Prof. Br. 21-22; *see also* Pet. App. 23 (Beam, J., concurring). These unusual provisions would be difficult to square with the Federal Rules of Civil Procedure -- unless one recognizes, as even Respondent's amici eventually do, that the President "is not like any other litigant."[2]

As this chorus of accommodation and deference illustrates, this case is not about whether the President is "above the law." Rather, this case is about identifying the proper means of protecting the compelling interests that are impli-

[2] Brief of *Amicus Curiae* American Civil Liberties Union ("ACLU Br.") 6.

cated when a private civil damages suit is filed against a sitting President. Respondent's "scheme of deference," however, actually endangers these interests; that is why deferral is the proper approach.

To begin with, there simply is no assurance that a trial court will be as deferential as respondent assumes. Respondent emphasizes language from the concurring opinion below, which called for a high level of deference. But she does not repudiate the more demanding standard of the majority opinion, which would require the President to prove that each aspect of the litigation would interfere with "specific, particularized, clearly articulated presidential duties." Pet. App. 16. The inescapable fact is that a "deference" standard, however formulated, cannot predictably be relied on to protect the Presidency, because it necessarily gives capacious discretion to trial judges.

Moreover, in the real world of litigation, it is inevitable that whenever the President seeks to postpone some scheduled aspect of the litigation, or asserts that he is not required to submit to a deposition or some other procedural requirement, the plaintiff will object. These objections in all likelihood will include, as they have here, claims that the President is abusing his office to obtain some undeserved litigation advantage, or that he seeks delay for political purposes. The trial judge will then have to decide, in a highly adversarial and politicized setting, whether the President's claim warrants the deference he requests. To fulfill this function, the trial judge will have to examine the President's priorities and determine whether to require the President to devote more time and attention to the litigation, and less to some competing matter of governance. Such inquiries -- likely to occur repeatedly throughout the litigation -- present a serious threat to separation of powers, as well as to the integrity of sensitive information about matters of national concern. *See* Brief for the Petitioner ("Pet. Br.") 29-34. And it should be evident that these problems are far more intractable when the President is

a defendant than when he is asked merely to give third-party testimony. *See id.* 26-29.

Ad hoc case management also cannot protect a President who is faced with an ever increasing number of civil damages actions. *See* Resp. Br. 7 (quoting Pet. App. 15). If more and more such suits are filed for purposes of publicity or partisan gain -- and in today's "no holds barred" political arena, there is every reason to believe that they will be -- it will be impossible for individual judges issuing piecemeal rulings in individual cases to manage the threat. However well-intentioned and deferential they may be, they will simply be unable to provide a coordinated response to the burgeoning obligations such litigation would impose on the President. Only a generally applicable prophylactic will adequately prevent overburdening the Presidency.

In short, the disadvantages of respondent's scheme are great when compared to a simple rule of deferral. Respondent's scheme necessarily creates serious separation of powers problems; deferral averts those problems. Respondent's scheme augments the litigation burdens placed on the President; deferral eliminates the prospect that litigation will divert the President from his official duties. Respondent's scheme does not deter the filing of unfounded suits against the President for illegitimate purposes; deferral minimizes that danger. Thus, even assuming that there is some marginal gain to legitimate claimants from respondent's scheme, it would not justify the substantial costs that it would inflict on our system of government.

B. Respondent's Scheme Cannot Be Reconciled With *Fitzgerald* And This Court's Other Immunity Decisions.

Contrary to respondent's contention, the deferral the President seeks here is not an expansion of the absolute immunity recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). It is a considerably narrower remedy, because it does not insulate a President from liability. Deferral is, moreover,

strongly supported by both the language and the underlying logic of *Fitzgerald* and this Court's other immunity decisions.

Respondent spends a great deal of energy arguing that *Fitzgerald* does not mean what it says. For example, respondent asserts that the Court in *Fitzgerald* was concerned only with ensuring that the threat of liability does not inhibit official decision-making. Resp. Br. at 11-16. The Court, however, noted how the simple fact of on-going litigation could interfere with the performance of official duties. The Court was quite explicit in saying that "diversion of [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751. And the Court explained that the President's exceptional immunity is necessary because "[t]he President occupies a unique position in the constitutional scheme" (*id.* at 749) and performs "singular[ly] importan[t] . . . duties." *Id.* at 751. The Court went out of its way to note that the President is "an easily identifiable target for suits for civil damages," and found that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. Each of these rationales for absolute immunity in *Fitzgerald* also dictates the more modest remedy of deferral in this case.[3]

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[3] *See also id.* at 763 (Burger, C.J., concurring) ("The need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today -- even a lawsuit ultimately found to be frivolous -- often requires significant expenditures of time and money . . . ."). Respondent contends that Chief Justice Burger's concurrence forecloses the argument that private civil damages actions against an incumbent President should be deferred, because the Chief Justice stated that immunity "does not extend beyond" official actions. Resp. Br. 11 (quoting *Fitzgerald*, 457 U.S. at 761 n.4 (Burger, C.J., concurring)). We of course, do not disagree with this statement, which addresses *absolute* immunity, in a case involving a *former* President. The Chief Justice's language quoted at the beginning of this note, however, demonstrates that he also was concerned that civil litigation would divert the President from his official duties. As this passage suggests, he did not endorse the notion that damages litigation of any kind could go forward against a sitting President. In fact, Mr. Fitzgerald's counsel (including the ACLU appearing as amici for respondent here) asserted in their brief that a civil damages suit against an incumbent President could be stayed. Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1738 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

The logic of *Fitzgerald* and the Court's other immunity decisions further negates two of respondent's other principal arguments. First, respondent asserts that personal damages litigation against a President will not divert him from his duties because Presidents "have good lawyers and assistants" and so can minimize their personal involvement. Resp. Br. 36. But the Court's immunity decisions emphasize repeatedly that immunity is needed because the litigation of even unfounded claims can cause "the diversion of official energy from pressing public issues." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).[4] A denial of immunity, qualified or absolute, is also immediately appealable, precisely because immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 870 (1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

These doctrines would make no sense if, as respondent supposes, damages litigation against public officials can simply be turned over to "lawyers and assistants" while the officials proceed with their jobs. To the contrary, the Court recognized that litigation can work a "distraction . . . from . . . dut[y]" *(Harlow*, 457 U.S. at 816), however good a public official's "lawyers and assistants" may be. This is so even

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[4] In *Harlow*, indeed, the Court reformulated the qualified immunity doctrine to eliminate the component that referred to an official's state of mind, precisely so as to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

when, as is typical in immunity cases, the defendant official is represented by government lawyers. Here, the suit concerns not official actions -- which subordinates may to some degree be able to defend -- but alleged personal conduct by the President. The complaint unjustifiably attacks the President's integrity, alleges serious wrongdoing, and seeks to hold him personally liable for hundreds of thousands of dollars in damages. In this context, respondent's notion that a President can largely disregard the litigation -- or that he would choose to do so -- and rely instead on his lawyers, is simply implausible. *See* Pet. Br. 22-23.

Fitzgerald and the Court's other immunity decisions also reject the notion, urged by respondent and her amici, that the Court should require the President to make a showing, at each stage of any case brought against him, that a particular aspect of the litigation has become too burdensome. Instead of such a piecemeal approach, the Court's immunity decisions adopt a general rule of immunity -- a rule that is a much greater imposition on potential plaintiffs than mere deferral.

Thus, for example, respondent and her amici assert that whatever might be said of other cases against a President, this case should proceed because it is one of "manifest simplicity" (Resp. Br. 9), and that it "[s]urely" would not be too burdensome for the President to file an answer "to a short complaint like [respondent's]." Resp. Prof. Br. 6. They also insist that courts can dispose of unfounded claims easily,[5] and that the President should be required to make a specific showing whenever he seeks protection from some aspect of discovery.[6] Finally, they maintain that the trial schedule can be adjusted in a way that adequately protects the President, upon a specific showing of need. Resp. Br. 35.

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[5] Resp. Br. 35 (quoting Pet. App. 16); ACLU Br. 12-13.

[6] Resp. Br. 27; Resp. Prof. Br. 6; ACLU Br. 4.

Every one of these arguments could be said to militate against absolute Presidential immunity as well. Yet the Court in *Fitzgerald* embraced none of them. *Fitzgerald* did not attempt to differentiate "simple" suits from others -- for the obvious reason, among others, that it is impossible to be sure at the outset that a case will in fact be simple.[7] The Court in *Fitzgerald* also well understood that the mechanisms for weeding out unfounded suits are far from foolproof, and that such suits can impose severe burdens on a President even if the President ultimately prevails. 457 U.S. at 752 n.32 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). Nor did *Fitzgerald* rely on ad hoc trial court determinations, based on particularized showings by the President, to protect the President from unduly burdensome discovery or trial obligations. Instead, the Court recognized that once a President is enmeshed in civil damages litigation directed at him personally, the damage to his ability to govern, and to the separation of powers, is already done. There is no reason to believe that a piecemeal scheme would be any more successful here.

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[7] The instant suit is surely unpredictable on that score. In repeatedly asserting that this is a simple case (Resp. Br. 9, 27, 28, 40), respondent's counsel fail to credit their own statements that they intend "to fully pursue, and exhaustively pursue" a wide-ranging "pattern of conduct" by the President (C.A. App. 117-18, 122-23); that they will pursue this line of inquiry with the President and with numerous other witnesses (C.A. App. 117-18); and that they may seek to compel an unprecedented physical examination of the President. *Id.* As respondent's counsel told the press, litigation of this suit "will take some time." Stephen LaBaton, *Sexual Harassment Suit Should Not Be Tried While Clinton Is President, Judge Rules*, N.Y. TIMES, Dec. 29, 1994, at B6.

C. Private Civil Damages Litigation Would Impair The President's Ability To Perform The Duties Of His Office.

Quoting Chief Justice Marshall, respondent contends that the burdens of the Presidency are "not unremitting," and that the President should be able to defend against private civil damages actions in his spare time. Resp. Br. 29 (quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d)). President Jefferson refuted this assertion at the time it was made.[8] Since then, of course, the burdens on the Presidency have increased exponentially.

There simply is no basis for respondent's bald assertion that "Presidents have always had time to fulfill personal commitments." Resp. Br. 29. To the contrary, as documented in the Solicitor General's brief, almost every President has remarked on the incessant demands of the office.[9] This is not surprising, in view of the fact that the Constitution vests the entire power of the Executive Branch in a single individual. U.S. CONST. art. II, § 1. As David McCullough, a pre-

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[8] President Jefferson responded:

> The Judge [Marshall] says, "*it is apparent* that the President's duties as chief magistrate do not demand his whole time . . . ." If he alludes to our annual retirement from the seat of government, during the sickly season, he should be told that such arrangements are made for carrying on the public business, at and between the several stations we take, that it goes on as unremittingly there, as if we were at the seat of government. I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing. . . . It would be very different were we always on the road, or placed in the noisy and crowded taverns where courts are held.

Letter from Thomas Jefferson to George Hay, (June 20, 1807), 11 The Writings of Thomas Jefferson 239, 242 (Andrew A. Lipscomb ed., 1904).

[9] Brief of *Amicus Curiae* United States, 10-12.

eminent biographer of Presidents, recently observed, to be the Chief Executive is to experience "unrelenting responsibility."

> It is a 24-hour-a-day job that you cannot walk away from. You're president not just today, but tomorrow and next week and the week after and the month after and the year after, every single hour.[10]

The Presidency, he concluded, is "the hardest job in the world." *Id.*[11]

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[10] Mr. McCullough further observed:

> [W]e're hiring [the President] to do more than one human being can possibly deliver. He is the chief of state, head of state; he is the commander-in-chief of the armed forces; he is the head of his political party; he is the preacher for the country, in a way, standing, as Theodore Roosevelt called it, in the Bully Pulpit . . . . [H]e is the only person, the only individual who represents all the people.
>
> . . . .
>
> . . . It's beyond anyone's previous experience or natural ability. . . . I don't think anybody -- no historian, no journalist, no politician in the Senate or House or anywhere in the country can ever possibly understand what it is to be President without becoming President. And every single president, once becoming president, has written about or talked about how different it is from what they expected.

Comments of David McCullough, *Riding The Tiger* (CNN television broadcast, Sept. 8, 1996) (Tr. # 934-2, available in LEXIS, Nexis Library, Script File). Mr. McCullough is the author of *Truman* (Simon & Schuster 1992), and *Mornings On Horseback*, a biography of Theodore Roosevelt (Simon & Schuster 1981), and is currently working on a history of the Presidencies of John Adams and Thomas Jefferson.

[11] Respondent also states incorrectly that the lawsuit against President Truman was "actively litigated during his term in office." Resp. Br. 32 n.15. That suit was dismissed by the trial court on April 11, 1945, the day before President Roosevelt died and Harry Truman became President. Notice of Appeal, *DeVault v. Truman*, No. 498465, (Jackson County Cir. Ct., Mo.) filed April 18, 1945. As stated in our opening brief, the only activity in the case after President Truman took office was the appeal of the dismissal, which was sustained on purely legal grounds. *DeVault v.*

Separation of powers concerns, moreover, distinguish litigation against a President from those situations where a President briefly and voluntarily absents himself from official duties to engage in recreational or political activities. In the latter circumstances, the President -- not a judge or a civil plaintiff -- determines the priorities for the Chief Executive's time, and the President remains available to perform the duties of office continuously, irrespective of such other activities. A President may have to (and often does) interrupt such activities to attend to pressing official duties, and is free to do so without seeking permission from anyone. *See* Pet. Br. 13 n.9. In the litigation setting, however, the President would be subject to the jurisdiction of a federal or state court, and would have to seek approval of the court to change or interrupt a litigation commitment to attend to unexpected official business.

D. Deferral Is Not An Extraordinary Remedy.

In the opening brief, we showed that the temporary deferral of litigation is far from unusual in our system, and we offered a number of analogous contexts in which litigation is stayed -- often with undeniable prejudice to the plaintiff -- in order to protect important institutional interests. Respondent and her amici seek to distinguish these analogies on the ground that they do not involve "a special, personal privilege." Resp. Br. 25; *see also* Resp. Prof. Br. 2. It is unclear what is meant by this phrase. The doctrine of deferral is no more a "personal privilege" of the President than any other incident of his office, or than any immunity or similar protection is for any other public official. Deferral is necessary to preserve the functioning of the Presidency, and to protect the compelling institutional interests of the Executive Branch. It

Truman, 194 S.W.2d 29 (Mo. 1946). Accordingly, President Truman was not involved in active litigation while in office.

attaches to the office, not the person. It is no different in this respect from the "deference" for which respondent argues.

Deferral is directly analogous to the other stay doctrines we mentioned, all of which -- whether based on statute, judicial discretion or court-made doctrine -- delay a civil plaintiff's ability to obtain relief. Pet. Br. 34-37.[12] Respondent simply cannot explain why the compelling interests at stake here -- the unimpaired operation of the Executive Branch and the preservation of the separation of powers -- are not at least as strong as those present in the analogous contexts, and do not also justify a temporary stay of proceedings. Nor can she explain why deferring litigation against a President would impermissibly violate a plaintiff's entitlement to access to the courts, any more than those other types of stays do.[13]

[12] In this regard, respondent incorrectly asserts that pursuant to the automatic stay in bankruptcy, a plaintiff's tort claims are simply transferred to bankruptcy court and "immediately addressed" there. Resp. Br. 25. This is not so. The litigation cannot proceed in any forum without leave from the bankruptcy court, which typically is not granted until the court approves a plan for the debtor's estate, a complicated process that can take months or years. *See, e.g., Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 847-48 (5th Cir. 1990); *In re Washington Mfg. Co.*, 118 B.R. 555, 559-60 (Bankr. M.D. Tenn. 1990). The reality is that most claimants must wait long periods before their claims are addressed, if ever. *See, e.g., Moser v. Universal Eng'g Corp.*, 11 F.3d 720, 721-22 (7th Cir. 1993); *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 907 (6th Cir. 1993).

[13] On a related point, respondent and her amici contend that authority to stay this litigation must be found, if at all, in an act of Congress. Resp. Br. 26; Resp. Prof. Br. 19 n.14; CVA Br., *passim*. In *Fitzgerald*, however, the Court recognized that certain privileges and immunities are "functionally mandated incident[s] of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history" (457 U.S. at 749), and that there need not be a textual basis in the Constitution for such privileges and immunities. *Id.* at 750 n.31. The protection the President here asserts is another such incident of office. With regard to congressional action, moreover, the Court in *Fitzgerald* took an approach opposite that for which respondent contends: the Court

E. Deferral Will Not Lead To Abuse Of Office.

Respondent raises the specter that deferral would shelter a variety of Presidential wrongdoing, from defaulting on a debt to committing battery. Resp. Br. 24. The notion that the rule we advocate would increase the likelihood of misconduct by a President is, in a word, fanciful. As we showed in our opening brief, and as the Court underscored in *Fitzgerald*, there already are abundant forces to deter a President from private wrongdoing. *See* Pet. Br. 37; *Fitzgerald*, 457 U.S. at 757. These deterrents -- coupled with the knowledge that a plaintiff could vigorously pursue a civil claim and subject a President to damages following his tenure in office -- are sufficient to discourage misconduct in his private affairs. Realistically, with respect to deterrence and accountability, the differences between deferral and the respondent's proposed "scheme of deference" are non-existent.

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declined to presume that Congress intended to subject the Chief Executive to litigation, absent an explicit, affirmative expression of legislative intent to do so. *Id.* at 749 n.27. Similarly, in Section 1983 cases such as this, the Court has repeatedly declined to infer congressional intent to override immunities "well grounded in history and reason." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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